

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOMBARDIER INC.,

Plaintiff,

v.

MITSUBISHI AIRCRAFT
CORPORATION, MITSUBISHI
AIRCRAFT CORPORATION AMERICA,
INC., et al.,

Defendants.

2:18-cv-1543 RAJ

DEFENDANT MITSUBISHI AIRCRAFT
CORPORATION AMERICA, INC.'S
POSITION ON SCHEDULING ISSUES

The parties sought a scheduling conference to resolve five issues needed to establish a fair process to resolve Plaintiff Bombardier Inc.'s Motion for a Preliminary Injunction. (Dkt. 4). The parties recently resolved two of the five issues, and partially resolved another. The rest remain for decision by the Court. Defendant Mitsubishi Aircraft Corporation America, Inc. ("Mitsubishi Aircraft America") now respectfully provides its position on the remaining issues, pursuant to the Court's Order. (Dkt. 45).

I. APPLICABLE FACTS

A. The Motion for Preliminary Injunction

Bombardier filed its Motion for a Preliminary Injunction ("the Motion") on October 19, 2018. Bombardier originally noted the Motion for November 16, 2018, (Dkt. 4), but the Motion

MITSUBISHI AIRCRAFT AMERICA'S POSITION ON
SCHEDULING ISSUES (NO. 18-CV-1543 RAJ) – 1

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1 is now noted for January 4, 2019. (Dkt. 46.) Bombardier's Motion was filed almost three years
2 to the day from when Bombardier first raised the issues in this case—Exhibit B to Bombardier's
3 Complaint shows Bombardier first challenged a defendant's conduct on October 22, 2015, when
4 it contended that Defendant AeroTEC was allegedly hiring Bombardier employees. (Dkt.1.)
5 Bombardier then filed its Motion three years later, long after any preliminary injunction could
6 have prevented the alleged harm. Mitsubishi Aircraft America will demonstrate that no alleged
7 trade secrets were misappropriated, or indeed, that it even received the alleged secrets.
8 Regardless, Bombardier's Motion was filed long after it could prevent the supposed harm
9 Bombardier alleges.
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18 The Motion contends, *inter alia*, that Mitsubishi Aircraft America misappropriated
19 alleged trade secrets for use in certifying the Mitsubishi Regional Jet ("MRJ"). In the
20 accompanying Proposed Order (Dkt. 4-1), Bombardier requests, *inter alia*, that the Court enjoin
21 Mitsubishi Aircraft America from using eleven Bombardier documents, and any information
22 "derived from" those documents. Bombardier contends that the documents were
23 misappropriated by former-Bombardier employee Defendants Laurus Basson, Marc-Antoine
24 Delarche and Cindy Dornéval. None of the individuals are alleged to have ever worked for
25 Mitsubishi Aircraft America, and the evidence will show that the individuals did not provide the
26 documents to, or use the documents on behalf of, Mitsubishi Aircraft America (or any other
27 Defendant.) Nonetheless, Bombardier contends that the alleged trade secrets were
28 misappropriated by Mitsubishi Aircraft America, as well as the other Defendants.
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41 **B. Bombardier Intends to File Successive Motions for Preliminary Injunctions.**

42 The pending Motion for a Preliminary Injunction seeks to enjoin two of the three
43 corporate Defendants: Mitsubishi Aircraft America and AeroTEC, both of whom have been
44 served. Until 2:02 PM today, the Motion sought to enjoin three of the five individual Defendants
45 from using information on the MRJ program: Mr. Basson, Ms. Dornéval and Ms. Delarche. (Dkt.
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51 4.) Bombardier notified Defendants' counsel at that time that it would no longer seek a

preliminary injunction against individuals.¹ (Decl. J. Riedinger ¶ 2 Ex. A.). Bombardier has also stated in its Motion that it intends to file a second preliminary injunction motion, this time against Mitsubishi Aircraft Corporation (“MITAC”), a Japanese corporation, and Keith Ayre, a resident of Japan, after it effects service on those Defendants. (*See* Dkt. 4 n.1.) Bombardier’s second motion for a preliminary injunction will be based on the “same substantive grounds” as the first motion, and will seek the same injunctive relief but against MITAC and Mr. Ayre. (*Id.*) Bombardier thus intends duplicative motions on the same grounds, addressing the same documents.

C. The Alleged Trade Secrets

Bombardier filed its Motion for a Preliminary Injunction accompanied by an extremely broad Proposed Order. (*See generally* Dkt. 4-1.) That Proposed Order sought an injunction against the use of 15 documents (*id.* at 2), but only eleven were discussed in Bombardier’s Motion (*see generally* Dkt. 4). It also proposed an injunction against use or disclosure of “any additional documents, and any information or data contained therein” that “were retained by former Bombardier employees.” (Dkt. 4-1 ¶¶ 2-3.) The Proposed Order did not identify or describe any of the “additional documents” or place any limit on which persons were “former Bombardier employees.” Mitsubishi Aircraft America has discussed the breadth of that Proposed Order for weeks with Bombardier, which is why the Stipulated Motion for a Scheduling Conference listed “Trade Secret Identification” as one of the topics for resolution. Bombardier’s email this afternoon narrowed Bombardier’s Motion to the eleven documents subject to the pending Motion to Seal. (Decl. Riedinger Ex. A.)

The eleven remaining documents consist of hundreds of pages, and Bombardier agrees that not all the information in those hundreds of pages of documents are trade secrets. (*See, e.g.*, Dkt. 5 at 15.) Bombardier’s Motion fails to distinguish between the public information in the

¹ Mr. Delarche, a resident of Japan, has not been served with the Summons and Complaint.

documents, and the allegedly trade secret information. Bombardier nevertheless seeks to enjoin the Mitsubishi Aircraft America from using any information in the eleven documents, or any information derived from those documents, regardless of whether the information is secret. (Dkt. 4-1 at 2-3.)

D. Bombardier Has Known for Years of the Alleged Misappropriation

Bombardier first raised the issues addressed by its Motion in 2015. It did not file suit. Nor did it attempt to seek an injunction. The three individuals alleged to have misappropriated the eleven documents left Bombardier in March 2016, May 2016, and February 2017. (*See* Dkt. 1 at ¶¶ 60-62.) Bombardier again did not file suit, and again did not seek an injunction. Bombardier’s theory of misappropriation is summarized as (a) those three individuals collectively emailed the eleven documents to their personal email addresses before they left Bombardier and went to work for AeroTEC, and thereafter (b) the delay in certification of the MRJ was somehow reduced by an unidentified use of the documents by AeroTEC and Mitsubishi Aircraft America. Bombardier could have asserted the same theory it is now pursuing at least by early 2017, but delayed until October 2018 to assert its Motion, and plans yet another, nearly identical motion, sometime next year.

II. Pending Issues

Mitsubishi Aircraft America’s position on the remaining issues is as follows:

A. Multiple Preliminary Injunction Motions are Improper

The pending Motion is premature. It should be decided only after all parties are served, and Bombardier files its second motion for a preliminary injunction. Bombardier should not be allowed to file consecutive preliminary injunction motions to obtain “the same injunctive relief” against other Defendants (MITAC and Keith Ayre) “on the same substantive grounds. . . as that now requested.”

Successive motions for preliminary injunctions on the same grounds are not contemplated by the rules and are inherently inefficient. Such motions waste judicial resources

1 and improperly give a plaintiff multiple bites at the apple, thereby encouraging piecemeal
2 litigation. Bombardier's delay in filing its Motion also shows that there is no urgency to any
3 issue that warrants having the same issue decided in successive motions. The facts alleged in the
4 Motion have been known to Bombardier since at least early last year, the alleged
5 misappropriation occurred at least 22 months ago, and Bombardier had an opportunity to seek a
6 preliminary injunction as long as three years ago. Fundamental fairness and judicial economy
7 mandate that the pending Motion not be considered until after all parties have been served and
8 had an opportunity to address the accusations against them, especially where, as here,
9 Bombardier delayed for years any attempt to obtain a preliminary injunction.
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19 **B. Access to Unserved Documents & Interim Confidentiality Agreement**

20 The parties have resolved this issue pursuant to the terms and conditions set forth in an
21 Interim Confidentiality Agreement negotiated by the parties. (Decl. Riedinger Ex. B.)
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25 **C. Briefing Schedule for the Motion for Preliminary Injunction**

26 Bombardier seeks to file consecutive motions. Until Bombardier files its second motion,
27 the present Motion is premature, improper, and inefficient.
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31 If the pending Motion nonetheless proceeds with its current noting date of January 4,
32 2019, the parties have agreed upon a briefing schedule, and this portion of the issue has been
33 resolved.
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37 **D. Trade Secret Identification**

38 Bombardier's eleventh hour narrowing of the Proposed Order has resolved much of this
39 issue, although it does not resolve the fact that Plaintiff admits the eleven documents also
40 contains non-trade secret information. Plaintiffs should be required to identify the trade secrets
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1 within the eleven documents for the reasons set forth in Mitsubishi Aircraft America's response
 2 to Bombardier's Motion to Seal.²
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5 **E. An Evidentiary Hearing Should be Conducted**

6 A short (at most two-day) evidentiary hearing is appropriate on Bombardier's motion.
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 8 Such hearings are appropriate when justified by "general concepts of fairness, the underlying
 9 practice, the nature of the relief requested, and the circumstances of the particular cases." See 7
 10 J. Moore, J. Lucas & K. Sinclair, Moore's Federal Practice ¶ 65.04[3] at 65–59 n. 12 (2d ed.
 11 1986).
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16 Bombardier's contentions are sharply contested by Defendants, especially since
 17 Bombardier relies only on speculation to contend that its alleged trade secrets were
 18 misappropriated by Mitsubishi Aircraft America. Bombardier assumes progress toward
 19 certifying the MRJ has accelerated since AeroTEC and Mitsubishi Aircraft America hired former
 20 Bombardier employees, and from that, Bombardier further assumes that the progress resulted
 21 from misappropriation of its alleged trade secrets. (Dkt. 4 at 17-18.) Yet Bombardier has not
 22 identified any facts showing Mitsubishi Aircraft America even received the allegedly
 23 misappropriated documents, let alone used them.
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33 Defendants seek the opportunity to refute Bombardier's speculative conclusions through
 34 live testimony, including from the individual defendants whom Bombardier contends
 35 misappropriated the documents. The individuals will explain that they did not provide the
 36 documents to Mitsubishi Aircraft America (or any other defendant), and that the documents were
 37 not used in the MRJ program. The individuals will also explain that the allegedly
 38 misappropriated documents were used by the individuals at their homes only to perform work for
 39 Bombardier. The Court should have the opportunity to listen to the witnesses and evaluate their
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49 ² At the time this paper was completed, Bombardier had not yet served a revised Proposed Order. If that
 50 order does not match the assertions in Bombardier's 2:02 PM email, Mitsubishi Aircraft America will seek leave to
 51 address any issues the new proposed order may create. (Decl. Riedinger Ex. A.)

1 credibility. Mitsubishi Aircraft America also believes the Court should hear other witnesses
 2 explain that (1) the documents at issue do not contain trade secrets and (2) the differences
 3 between the MRJ and Bombardier's aircraft prevent the alleged Bombardier trade secrets from
 4 even being useful to the Defendants' certification efforts.
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 9 Allegations of trade secret misappropriation are serious, and by themselves cause serious
 10 harm to the defendants. Live testimony is the best way for the Defendants to show the Court that
 11 the Defendants acted in good faith, and did not misappropriate the alleged secrets.
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 15 RESPECTFULLY SUBMITTED this 7th day of December 2018.
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Attorneys for Defendant Mitsubishi Aircraft
 Corporation America, Inc.

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on December 7, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses indicated on the Court's Electronic Mail Notice List.

DATED this 7th day of December 2018.

s/Mary Z. Gaston

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